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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GRETA SEDEAL CURTIS,

Cross-complainant and
Appellant,

v.

BOOSTZ, INC., et al.,

Cross-defendants and
Respondents.

B287294

(Los Angeles County
Super. Ct. No. BC629121)

APPEAL from an order of the Superior Court of
Los Angeles County, Gail Ruderman Feuer, Judge. Appeal
dismissed.

Greta Sedéal Curtis, in pro. per., for Cross-complainant and
Appellant.

Law Offices of Robert A. Brown and Robert A. Brown for
Cross-defendants and Respondents.

Respondents Boostz, Inc., Saleh Hasbun, Baypoint Mortgage, Inc., Westar Financial Group, Inc., Valley Trust Deed Services, Inc., Amber Hasbun, Melissa Hasbun, and Ammec Investments, Inc. filed a motion to dismiss the appeal filed by Greta Sedeal Curtis. They also request sanctions for filing a frivolous appeal.

Curtis filed a motion for relief from default for failure to file a final judgment on appeal.

We grant respondents' motion to dismiss the appeal, deny respondents' request for sanctions, and deny appellant's motion for relief from default for failure to file a final judgment on appeal.

FACTUAL SUMMARY

Gary Paul O'Connor commenced the underlying action in August 2016 by filing a complaint against Curtis and others. The complaint requested damages and equitable relief based upon breach of contract and promissory fraud.

On May 11, 2017, the trial court set a trial date of December 11, 2017. The court subsequently vacated that trial date and proceedings in the trial court are stayed pending this appeal.

On May 25, 2017, Curtis filed an answer to O'Connor's complaint and a cross-complaint.¹ Certain cross-defendants filed a motion to strike the cross-complaint on the ground that the pleading was filed after the court set a trial date and without leave of court, as required by Code of Civil Procedure

¹ Neither Curtis's answer to O'Connor's complaint nor her original cross-complaint are included in our record. The dates these pleadings were filed are reflected in the trial court's September 25, 2017, order striking Curtis's amended cross-complaint.

section 428.50.² Before the motion was heard, Curtis filed an amended cross-complaint. She named as cross-defendants O'Connor and the respondents in this appeal. She also named as cross-defendants "Roes 1 through 20," whose true names were allegedly unknown to her.

In August 2017, respondents filed motions to strike the amended cross-complaint, reasserting the argument that the pleading was filed after the court set a trial date and without leave of court.

On September 27, 2017, the court granted the motions to strike "without prejudice" stating, "Curtis may file a properly noticed Motion for Leave to File Cross-Complaint at a later time. The issue of whether Curtis should be granted leave to file a new cross-complaint against [the] moving cross-defendants is not currently before the court." The court stated that the cross-complaint was "properly filed as against plaintiff . . . O'Connor" and it remains pending.³

² Statutory references are to the Code of Civil Procedure.

Section 428.50 provides:

"(a) A party shall file a cross-complaint against any of the parties who filed the complaint or cross-complaint against him or her before or at the same time as the answer to the complaint or cross-complaint.

(b) Any other cross-complaint may be filed at any time before the court has set a date for trial.

(c) A party shall obtain leave of court to file any cross-complaint except one filed within the time specified in subdivision (a) or (b). Leave may be granted in the interest of justice at any time during the course of the action." (§ 428.50, subs. (a)–(c).)

³ The cross-complaint, which Curtis filed on the same day as her answer, was properly filed against O'Connor because

On October 19, 2017, Curtis filed eight documents (the Roe amendments), each purporting to amend her “complaint” by substituting one of the respondents (with one exception) for a particular fictitiously-named “Roe” defendant.⁴ The amendments are made on Los Angeles County Superior Court form “LACIV 105 (Rev. 01/07).” The form includes the following: “ORDER [¶] THE COURT ORDERS the amendment approved and filed,” followed by a space for the signature of a judicial officer. On each of Curtis’s forms, that space was left blank.

Some of the respondents responded to the Roe amendments by filing an ex parte application to shorten time for filing a motion for sanctions under section 128.5 on the ground that Curtis filed the amendments “in direct defiance” of the court’s September 27, 2017 order. On October 26, 2017, the court denied the ex parte application “for lack of exigency,” without prejudice to the respondents’ filing a noticed motion for sanctions.

On November 17, 2017, a hearing was held on plaintiff O’Connor’s demurrer to Curtis’s amended cross-complaint. In a minute order concerning that hearing, the court stated that it

section 428.50, subdivision (a), permits the filing of a cross-complaint without leave of court as to a party “who filed the complaint . . . against him or her before or at the same time as the answer to the complaint.” Curtis’s amended cross-complaint was also properly filed against O’Connor because O’Connor had not yet filed a responsive pleading to the cross-complaint. (See (§ 472; Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2018) ¶ 6:603, p. 6-173.)

⁴ The one exception is Ammec Investment, Inc. Although it is one of the parties moving to dismiss the appeal, our record does not include a document (among the Roe amendments) naming Ammec Investment, Inc. as a party to the cross-complaint.

was, sua sponte, striking the Roe amendments “for violating the Court’s September 25, [sic] 2017 order.”⁵ Curtis appealed from that order.

DISCUSSION

I.

With some exceptions not applicable here, a litigant cannot appeal from an interlocutory order. (§ 904.1, subd. (a)(1).) An order is interlocutory when there remains some further judicial action by the trial court that is essential to a final determination of the rights of the parties. (*Olson v. Cory* (1983) 35 Cal.3d 390, 399.)

The September 27, 2017 order struck Curtis’s amended cross-complaint as to the respondents because Curtis failed to seek leave of court as required by section 428.50, subdivision (c). In that order, the court informed Curtis that she “may file a properly noticed [m]otion for [l]eave to [f]ile [c]ross-[c]omplaint at a later time.” This order was interlocutory because it expressly left open the possibility for further judicial action before a final determination of Curtis’s rights vis-à-vis respondents. Specifically, the court could act on a “properly noticed [m]otion” by either granting a motion to amend Curtis’s cross-complaint—and thereby bring the respondents into the case as cross-defendants—or denying the motion to amend.

Curtis did not, however, file a motion for leave to amend; she simply filed the Roe amendments without requesting or obtaining the leave required by law and the court. (§§ 428.50,

⁵ The minute order’s reference to September 25 appears to be a typographical or inadvertent error; the date of the pertinent order is September 27, 2017.

473, subd. (a)(1) & 474; see generally 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 489, p. 626.)

In its November 17, 2017 order, the court struck the Roe amendments because Curtis violated the September 27, 2017 order. Although not stated explicitly, the order implies that Curtis violated the prior order by filing the Roe amendments without first seeking and obtaining leave to file those eight documents.

When the November 17, 2017 order striking the Roe amendments is read in light of the September 27, 2017 order and Curtis's failure to obtain leave to file the Roe amendments, it does not appear that the court was thereby precluding Curtis from filing a motion for leave to amend to add respondents as cross-defendants. That is, the court, in striking the Roe amendments, did not indicate that it would deny a proper motion to allow them. Nor did the November 17, 2017 order modify the court's September 27, 2017 order allowing Curtis to file the required motion. Accordingly, Curtis can, so far as our record shows, still do so.

Because the November 17, 2017 order does not preclude Curtis from filing a motion for leave to add respondents as cross-defendants, the order is interlocutory and nonappealable.

Curtis relies on *Kuperman v. Great Republic Life Ins. Co.* (1987) 195 Cal.App.3d 943. In *Kuperman*, defendant Great Republic Life Insurance Company ("Great Republic") moved to strike a third amended complaint as to it. The court granted the motion without prejudice to plaintiff filing a motion for leave to add Great Republic as a defendant. (*Id.* at p. 946.) The plaintiff then made that motion, which the court denied. The plaintiff appealed. On these facts, the court held that the order striking the third amended complaint was appealable as a final judgment. (*Id.* at pp. 946-947.)

Kuperman is factually analogous up to the point where the court struck the plaintiff's pleading as to Great Republic and permitted the plaintiff in that case to make a motion for leave to amend to add Great Republic as a defendant. It is distinguished from the present case, however, by the fact that the plaintiff in *Kuperman* made a motion for leave to amend, which the court denied. Here, by contrast, Curtis never made the motion for leave to amend as to the respondents. If she did and the court denied that motion, then *Kuperman* would be analogous. But in the absence of such a motion and its denial, *Kuperman* does not aid Curtis.

Curtis argues that, although the court had set a trial date, she had the right under subdivision (a) of section 428.50 to file her cross-complaint at the time she filed her answer even as to parties other than the plaintiff. Subdivision (a), however, must be read in light of subdivisions (b) and (c), which require leave of court after a trial date has been set before filing a cross-complaint against anyone other than the party who filed the complaint.⁶ We need not, however, resolve this statutory interpretation issue at this time. Even if Curtis's interpretation

⁶ We note that Curtis was not required to wait until she filed her answer to file her cross-complaint. Subdivision (a) of section 428.50 permits the filing of a cross-complaint against a plaintiff "*before or at the same times as the answer to the complaint.*" (Italics added.) The word "before" was added to the statute to make it "clear that a cross-complaint may be filed 'before' as well as at the same time as the answer." (Recommendation and Study Relating to Counterclaims and Cross-Complaints, Joinder of Causes of Action, and Related Provisions (Oct. 1970) 10 Cal. Law Revision Comm. Rep. (1971) 499, 554.) Curtis could thus have filed her cross-complaint against plaintiff and respondents as a matter of right at any time before both her answer was filed and the trial date was set.

is correct and the court therefore erred in striking her amended cross-complaint and her Roe amendments, those orders remain interlocutory and nonappealable because the trial court has not finally determined the rights of the parties: It may still allow Curtis to file a cross-complaint against the respondents upon presentation of a motion for leave to file the cross-complaint. If Curtis makes such a motion and the court denies it in an appealable order, the interlocutory orders striking Curtis's cross-complaint and her Roe amendments—and the interpretation of the statute those orders imply—would then be reviewable. Unless and until then, however, we do not have jurisdiction to consider the issues raised by the court's interlocutory orders.

Curtis also asserted below that section 428.50, subdivision (b) did not apply because she filed her amended cross-complaint after the trial date in the case had been vacated. The trial court rejected this argument based on *Loney v. Superior Court* (1984) 160 Cal.App.3d 719, which construed the statute to require leave of court before filing a cross-complaint after a trial date has been set and vacated. (*Id.* at p. 722.) The *Loney* court explained that the language of the statute, which permits the filing of a cross-complaint without leave of court “ ‘at any time before the court has set a date for trial,’ ” cannot be rewritten by the court to read: “ ‘at any time before the court has set a date for trial, or, if the trial date is vacated, at any time prior to the case being reset.’ ” (*Ibid.*, italics added; see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial, *supra*, ¶ 6:555, p. 6-164.) As with the statutory interpretation issue identified above, the question whether the trial court correctly followed *Loney* is not before us because the court may, if requested, allow Curtis to file her cross-complaint against the respondents.

We therefore dismiss the appeal.⁷

II.

In her motion for relief from default for failure to file a final judgment on appeal, Curtis acknowledges that the November 17, 2017 order is not an appealable judgment and that her appeal is premature. She contends, however, that this defect occurred because the trial court failed to enter an appealable judgment of dismissal. Curtis requests that we direct the trial court to enter such a judgment.⁸

As Curtis points out, a reviewing court may treat an unappealable order as an appealable judgment when, for example, the trial court has granted a motion for summary judgment or motion for judgment on the pleadings, but has not entered a final judgment. (See, e.g., *Swain v. California Casualty Ins. Co.* (2002) 99 Cal.App.4th 1, 6; *Donohue v. State of California* (1986) 178 Cal.App.3d 795, 800; see *Coe v. City of Los Angeles* (1994) 24 Cal.App.4th 88, 92 [court considered appeal from nonappealable minute order dismissing case for failure to bring case to trial within five years and directed court to enter judgment nunc pro tunc].) Courts have discretion to “save” an appeal in that situation because the challenged order effectively disposes of the issues in the litigation and the absence of a final

⁷ Because it does not appear from our record that Curtis’s appeal is frivolous or was filed solely to cause delay (§ 907; Cal. Rules of Court, rule 8.276(a)), we deny respondents’ request for sanctions.

⁸ In addition to opposition papers filed by the respondents, plaintiff O’Connor filed an opposition. As Curtis points out, O’Connor’s opposition is improper because he is not a respondent in this appeal. (See Cal. Rules of Court, rule 8.10(2).) We therefore disregard O’Connor’s opposition.

judgment is due to inadvertence or mistake. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2018) ¶¶ 2:267, pp. 2-166–2-167 & 2:238, pp. 2-142–2-143.)

Here, however, as discussed above, the trial court has not decided whether respondents will be made parties to Curtis’s cross-complaint. Curtis may still file a motion for leave to amend and, if she does, the court may grant that motion. The absence of a judgment of dismissal, therefore, is not due to inadvertence or mistake, but because the rights of the parties have not been finally determined. Because issues among the parties remain, the rule permitting us to save an appeal from a nonappealable order does not apply. Accordingly, we deny Curtis’s motion for relief from default for failure to file a final judgment.

DISPOSITION

The appeal is dismissed. Respondents are awarded their costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur.

CHANEY, J.

BENDIX, J.